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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1986

NO. 86-1171

LOUIE L. WAINWRIGHT, etc., et al.,

Petitioners,

v.

RICHARD T. DORMAN,

Respondent.

/

RESPONSE TO PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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RULES

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STATEMENT REGARDING RECORD REFERENCE

Whenever used herein, the symbol "A" followed by a pagination number will refer to the Appendix of Petitioner's Petition for Certiorari. (Example: A-1).

STATEMENT OF THE CASE

Respondent cannot accept Petitioners' Statement of the Case, as it omits significant aspects of the procedural history of this case and presents, at least in some respects, an argumentative version of the procedural history.

Respondent relies upon and expressly adopts that portion of the decision below setting forth the procedural history of this case, including the FACTS AND PROCEDURAL HISTORY portion of the opinion. (A-10). This portion of the decision below lists chronologically the significant filings and rulings in the lower courts and traces the procedural history of Respondent's thwarted attempts to exercise his constitutional right to represent himself. (A-10, 11-20). Faretta v. California, 422 U.S. 806, 95 S.Ct 2525, 45 L.Ed.2d 562 (1975).

ARGUMENT

Respondent, RICHARD T. DORMAN, responds to LOUIE L. WAINWRIGHT's, etc., et al., Petition for Writ of Certiorari as follows:

Petitioner, LOUIE L. WAINWRIGHT, Secretary, FLORIDA DEPARTMENT OF CORRECTIONS (hereinafter referred to as "PETITIONER"), seeks a Writ of Certiorari from this Honorable Court to review the Eleventh Circuit's decision in Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986). PETITIONER has failed to demonstrate that this case is of great public importance and has failed to establish that the Eleventh Circuit's decision expressly conflicts with decisions rendered by this Court or other Circuit Courts of Appeal. Supreme Court Rules, Rule 17.

In seeking review, PETITIONER has limited his plea to two primary concerns.[1] First, PETITIONER contends that this Court should grant review because of the impact of the Eleventh Circuit's decision upon the finality of decisions and the "strained" relationship between state and federal courts. Secondly, PETITIONER claims that the Eleventh Circuit's decision conflicts with decisions of the Supreme Court which analyze both "procedural default" and "deliberate bypass." (Petitioner's brief at p. 12).

THE ELEVENTH CIRCUIT'S DECISION DOES NOT HAVE A GREAT IMPACT UPON FINALITY OF STATE CRIMINAL PROCEEDINGS.

The impact of the Eleventh Circuit's decision upon the issue of finality, as well as state and federal court relations, is and will be minimal, particularly in light of the facts and circum-

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[1] Petitioner does not challenge the Eleventh Circuit's finding that " ... Dorman's constitutional right to proceed pro se was unquestionably denied." (A-52). As concluded by the Eleventh Circuit panel: "Finding a grave violation of Petitioner's constitutional right, we affirm." (A-10).

stances surrounding Dorman's procedural default. Dorman was convicted of grand theft. His case has languished in the judicial system almost without interruption since 1978. He has long since served the state sentence resulting from his conviction (A-25). The peculiar history of Dorman's attempts to represent himself and the repeated denials by a state court system apparently oblivious to this most fundamental constitutional right suggests that this case can best be characterized as a classic example of an appropriate implementation of the "cause" and "prejudice" standard of Wainwright v. Sykes, 433 U.S. 72 (1977).

The Eleventh Circuit, in a well reasoned and articulate decision, came to a most startling conclusion, which underscores the speciousness of Petitioner's arguments. Whereas, on the one hand, Petitioner argues that the Eleventh Circuit's decision "works an especially hard strain on the relationship between the state and federal courts," apparently suggesting that federal review of alleged constitutional deprivations intrude upon what should be exclusively a state court function, Petitioner gives mere lip service to what the Eleventh Circuit found to be the cause of Dorman's procedural default, "an unreasonable delay in the preparation of his trial transcript." (A-13, 14; 46).

This is not a case where a defendant represented by counsel failed to raise a claim on appeal because counsel, as a matter of tactics, determined not to include that issue on appeal. See: Smith v. Murray, 477 U.S. _____, 106 S.Ct. _____, 91 L.Ed.2d 434 (1986). Nor it is a case in which counsel deliberately withheld a constitutional issue in hopes of obtaining relief in the federal courts via sandbagging. This is a case in which a pro se litigant, faced with state occasioned delay in the preparation of his trial transcript, dismissed his appeal "without prejudice," apparently in an attempt to achieve a speedier review of his conviction, erroneously believing that he could refile it at a later time.

As the Eleventh Circuit acknowleged, Respondent, when faced with the inordinate delay in the preparation of the transcript,

began corresponding with the Clerk of the Court, inquiring as to the status of the transcript and ultimately filed a pro se Motion to Expedite preparation of the transcript and a "Petition for Remedial Writ," in an attempt to get the trial transcribed. (A-14, 16). Contrary to Petitioner's assertion, Respondent was patient. (Petition at p. 15). Only after his efforts proved unsuccessful did Petitioner dismiss the appeal and pursue collateral relief in the state court. (A-46).

It is this premise, the state's failure to provide a trial transcript to Respondent in a timely fashion in order to allow prosecution of the appeal, on which the Eleventh Circuit decided the issues presented:

> The state's failure to provide Dorman with a trial transcript within a reasonable time to perfect his appeal constitutes an external factor out of Dorman's control that suffices as "cause" for the dismissal of the direct appeal. (A-51).

It is clear from the decision below that the Eleventh Circuit correctly applied the "cause" and "prejudice" analysis to the alleged procedural default, consistent with Wainwright v. Sykes, supra and Murray v. Carrier, supra. (A-47).

In Question II presented by Petitioner, Petitioner suggests that the "Court of Appeals erroneously applied the voluntary relinquishment of a known right or privilege" standard in determining whether Petitioner had "deliberately bypassed" an available state remedy. (Petition at p. i). This question, however, is no longer an issue in this case. The Eleventh Circuit, expressly recognizing the holding in Murray v. Carrier, supra, applied the "cause and prejudice" doctrine to Respondent's alleged procedural default. (A-47). Although admittedly the Eleventh Circuit did address the "intentional relinquishment or abandonment of a known right or privilege" standard in discussing the deliberate bypass rule (A-42, 43), this was obviously in recognition of the implicit viability of that standard as interpreted in Fay v. Noia. See: Wainwright v. Sykes, 433 U.S. at 88 n.12. Also, it must be remembered that this case came to

the federal court in 1979, long before application of the "cause and prejudice" doctrine to appellate procedural defaults. Clearly, the United States Magistrate and counsel, in analyzing the procedural issues of this case, labored under the dichotomy of two distinctly different standards and all attempted to address the case on both standards. To be sure, the District Court, in response to Petitioner's Motion for New Trial, specifically addressed the issue of procedural default in the context of "cause and prejudice," recognizing that Wainwright v. Sykes had narrowed the "deliberate bypass" formulation of Fay v. Noia. (A-53). It should be noted that the District Court determined the issues prior to pronoucement of the decision in Murray v. Carrier, supra.

In any event, the Eleventh Circuit clearly recognized and followed the reasoning of Murray v. Carrier. It did not, notwithstanding Petitioner's Question II, apply the "voluntary relinquishment of a known right or privilege" formulation of Johnson v. Zerbst, 304 U.S. 458 (1938). Accordingly, the issue is a non issue.

The speciousness of Petitioner's argument is perhaps best evidenced by the inconsistency of its argument before this Court and its argument before the Eleventh Circuit. In the instant petition, Petitioner argues that the Eleventh Circuit erroneously applied the Johnson v. Zerbst "voluntary relinquishment" standard. (Petition at p. 17). Yet, before the Eleventh Circuit, Petitioner, at least in the view of that panel, urged "that the District Court wrongfully used this doctrine (cause and prejudice) as a means of circumventing the deliberate bypass standard of Fay v. Noia." (A-47).

THE QUESTIONS PRESENTED DO NOT INVOLVE QUESTIONS OF GREAT IMPORTANCE IN THE ADMINISTRATION OF HABEAS CORPUS PROCEEDINGS IN FEDERAL COURT.

Simply put, the questions presented by Petitioner are not sufficiently important to warrant review by this Court. The

decision below turns on its own facts and will affect few other cases and litigants. The Eleventh Circuit correctly applied the "cause and prejudice" doctrine, in accordance with Wainwright v. Sykes and Murray v. Carrier, supra. The court below fully considered and correctly decided the issues. The allegedly conflicting decisions are distinguishable on their own facts.

Respondent readily concedes that finality of state criminal proceedings is a legitimate state and federal interest. Murray v. Carrier, supra. Admittedly the decision below has some impact upon finality, as do all federal appellate decisions which address alleged deprivations of federal constitutional rights. However, what little impact this case may have is simply to confirm that state occasioned interference or delay with the progress of a criminal defendant's appeal will satisfy the "cause" prong of the cause and prejudice doctrine. Federal review of a constitutional claim which otherwise would have been lost by virtue of the procedural default will be justified.

Finality, in the context of state and federal relations and the vindication by federal courts of state deprived constitutional rights, necessarily begins with the correct application of federal constitutional principles to the administration of criminal justice by our state courts. Finality, therefore, is and will be pre-determined by the state court's recognition of and protection of fundamental constitutional rights. Deprivation of those rights undermines finality. Particularly, where as here, state occasioned interference or delay causes a procedural default, the state should not be heard to complain when the federal court, through its equitable exercise of the authority granted by the GREAT WRIT, steps in and vindicates federal constitutional deprivation. As the Eleventh Circuit observed in this case:

> "Dorman presented the state with ample opportunities to address his constitutional claims, especially that of the right to self-representation. Having failed to even address the question, the state cannot now complain about the federal court's exercise of its power over the state in vindicating constitutional guarantees." (A-46).

The state's failure to provide Dorman with a trial transcript within a reasonable time constitutes an external factor out of Dorman's control that suffices as "cause" for the dismissal of the direct appeal. (A-51).

Where, as here, the state court has been given the opportunity to address and resolve the constitutional issues, the interest of finality and comity have been satisfied. Murray v. Carrier, supra. "From the outset of the prosecution, Dorman asserted his desire to proceed pro se, which was continually denied." (A-10). All of Dorman's pro se pre-trial motions were "either denied or ignored." (A-11). His specific request to represent himself was "expressly denied" by the trial judge. (A-11). There was a "constant summary denial of his requests ... to proceed pro se." (A-35).

While Petitioner complains that Dorman, in dismissing his direct appeal, deprived the state court of its right to adjudicate the issue of denial of his right to represent himself, it cannot be denied that the trial court and the appellate court had ample opportunities to address, if they had been inclined to, this fundamental constitutional right. (A-46). For example, Dorman filed a pro se motion to disqualify the trial judge on grounds of prejudice against him because the court would not respond to Dorman's pro se motions or allow him to proceed pro se, citing Faretta v. California, 422 U.S. 806 (1975). (A-12). Thereafter, Dorman filed an interlocutory appeal, citing Faretta and complaining of the trial court's refusal to discharge the public defender. (A-12). Without comment, the appellate court denied this appeal. (A-13). It cannot be said, therefore, that Dorman did not afford the state courts the first opportunity to address this important constitutional issue. It is apparent, therefore, that the same state judicial system which now complains of lack of finality and federal intervention, long ago relinquished the opportunity to resolve the issue.

THE QUESTIONS PRESENTED WILL NOT HAVE GREAT IMPACT ON THE RELATIONSHIP BETWEEN STATE AND FEDERAL COURTS

Neither the decision below nor the questions raised by Petitioner will have great impact on the relationships between state and federal courts, whether they be strained or not. The decision below turns on its own peculiar facts. The case presents merely an example of the proper application of the standards set forth in Wainwright v. Sykes, as interpreted by Murray v. Carrier, supra, and Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783, 102 S.Ct 1558 (1982). The Eleventh Circuit correctly found, in accordance with Murray v. Carrier, supra, that the state's failure to provide Dorman with a trial transcript within a reasonable time constituted an objective external factor out of Dorman's control that sufficed as the "cause" for his dismissal of the direct appeal. (A-51).

In sum, the Eleventh Circuit properly applied correct Supreme Court precedent and controlling law to the facts of this case. It neither deviated from nor took issue with controlling standards as pronounced by this Court. The facts in this case are unique and are not likely to repeat themselves. The questions raised by Petitioner have, quite simply, been addressed and resolved by the decisions cited herein. The rules of law are clear and were properly applied in the decision below. While application of those rules to the facts in this case may have resulted in a different result from the cases cited, that merely underscores that these allegedly conflicting decisions are distinguishable on their own facts.

Petitioner suggests that the questions presented involve issues that have great impact on the "strained" relationships between state and federal courts. (Petition at p. 12). Any "strain" worked on the relationship between the state and federal courts by the decision below is the result of a state criminal justice system which was oblivious to the constitutional right of self-representation expressly invoked by Respondent. It is ironic that the same state system which ignored Respondent's repeated requests to proceed pro se now, through its state official,

complains that federal vindication of that same constitutional right somehow "works an especially hard strain on the relationship between state and federal courts." (Petition at p. 13).

THE LOWER COURT'S DECISION DOES NOT DIRECTLY OR EXPRESSLY CONFLICT WITH DECISIONS OF THE SUPREME COURT OR OTHER CIRCUIT COURTS.

The decision below does not conflict with Murray v. Carrier or Smith v. Murray. The Eleventh Circuit correctly applied Murray v. Carrier, in recognizing that the cause and prejudice doctrine applies to all procedural defaults regardless of what stage of the proceeding, trial or appellate, the default at issue occurs. (A-50). In accordance with Murray v. Carrier, the court below properly identified an objective factor external to the defense which constituted "cause" for Dorman's procedural default. (A-51). To be sure, Murray v. Carrier recognizes that "some interference by officials" can, in certain instances, constitute cause under this doctrine. 91 L.Ed.2d at p. 408.

Similarly, the decision below does not conflict with Smith v. Murray, 91 L.Ed.2d 434 (1986). In that case, appellate counsel failed to pursue a particular issue on appeal which, given that he raised thirteen (13) separate claims in his brief, constituted a deliberate tactical choice which could not, under the circumstances of that case, satisfy the cause prong of the cause and prejudice doctrine. Petitioner correctly quotes from that decision in which this Court stated that "a deliberate, tactical decision not to pursue a particular claim is the very antithesis of the kind of circumstance that will warrant excusing a defendant's failure to adhere to a state's legitimate rule for the fair and orderly disposition of its criminal cases." (Petition at p. 16). However, in Smith v. Murray, it was clear that the issue which counsel elected not to include in the appeal had been litigated in various state courts. As counsel in that case explained, he "consciously decided not to pursue that claim," after determining that present law would not support it.

Counsel's tactical decision obviously did not constitute ineffective assistance of counsel and therefore could not constitute "cause" for the procedural default.

Smith v. Murray is distinguishable from this case on its facts. There, the defendant was represented by counsel who made an informed, although unfortunate tactical decision. Here, a pro se defendant made an uninformed, albeit deliberate decision to forego his delayed appeal and pursue collateral relief with the hope of a speedier review of his conviction. Whereas in Smith v. Murray, the clear inference was that counsel elected to abandon a particular issue on appeal, here there is every indication that Dorman never intended to drop his complaint that he was deprived of his constitutional right to represent himself. Again, there is no conflict between the decision below and Smith v. Murray. The facts are different and the result was different. However, the same principles of law were applied to facts which are clearly distinguishable.

Finally, there is no conflict between the decision below and this Court's decision in Engle v. Isaac, supra. In the decision below, again, the Eleventh Circuit applied the same standards as dictated by the Supreme Court in Engle v. Isaac. The defendant Isaac was represented by counsel, who failed to object to a jury instruction and who sought redress in the federal court based upon a subsequent successful constitutional challenge to the instruction. The respondents in that case sought to establish the "cause" prong of the cause and prejudice doctrine by pointing to counsel's ignorance of the constitutional issue and the purported futility of raising the issue in state court. Finding that in the circumstances of the case, counsel's conduct did not constitute cause, this Court determined the claims to be barred. Here, however, Dorman did raise the issue repeatedly before the trial court and even raised the issue before the appellate court by way of interlocutory appeal. (A-11, 12). Accordingly, this case does not present a situation, as did Engle, where the deprivation of constitutional rights was never raised.

Contrary to the urgings of Petitioner, the decision below is in harmony, and not in conflict with the principles of finality and comity as embraced by this Court in Wainwright v. Sykes, Engle v. Isaac and Murray v. Carrier. The State of Florida had ample opportunity to clean its own house and vindicate its deprivation of Respondent's constitutional right to proceed pro se.

Murch v. Mottram, 409 U.S. 42 (1972) likewise does not afford a conflict which would justify review by this Court. In Murch, counsel misinterpreted a state procedural rule, resulting in a waiver of certain claims. In that case, counsel was specifically warned by the trial court of the risk he ran in declining to assert his claim but, "nonetheless chose to run that risk." 409 U.S. at 47. Clearly, a foundation for waiver was established when counsel assumed the risk after specific warning. In the decision below, no such warning was available to Respondent.

Contrary to the argument of Petitioner, Murch v. Mottram did not address the so called "tactical advantage" generally found to exist when deliberate bypass is established. (Petition at p. 18, 19). In any event, the Eleventh Circuit in dicta, merely traced the rationale underlying the deliberate bypass doctrine as it has evolved within that circuit when it spoke of the so called "tactical advantage" aspect of the deliberate bypass doctrine. (A-42). However, as Petitioner neglects to point out, the Eleventh Circuit did not, as a condition to its deliberate bypass determination, require that a habeas respondent demonstrate that the petitioner gain a tactial advantage.

Admittedly, Murch denounces the consideration of the subjective intent of a petitioner in determining whether a deliberate bypass occurred. 409 U.S. at 46. However, the Eleventh Circuit did not rely upon Dorman's subjective intent in dismissing his appeal. It relied upon the external objective factor, "the state's failure to provide Dorman with a trial transcript within a reasonable time to perfect his appeal ....," in assessing whether the procedural default could be excused. (A-51).

CONCLUSION

Respondent respectfully suggests that the questions presented are not important enough to warrant review by this Court. The decision below turns on its own facts and will affect few, if any, other cases and litigants. The Eleventh Circuit correctly applied controlling Supreme Court precedent. It fully considered and correctly decided the issues in accordance with that precedent. Its decision is in harmony with and not in conflict with controlling decisions of this Court. Petitioner has failed to demonstrate that the decision below involves questions of great importance in the administration of habeas corpus proceedings in federal court, that those questions involve issues which have great impact on the relationships between state and federal courts or that there is conflict between the decision below and controlling precedent or decisions of other circuits.

Respondent's odyssey began in 1978 and has wandered through state and federal courts for nearly ten (10) years. Petitioner pays great honor to the doctrine of finality. Yet, it is finality which suggests that the Petition for Certiorari be denied. Respondent has served his time (A-25). His only recourse is a second trial with a hope of vindicating himself long after the prejudice resulting from his constitutional deprivation has been occasioned.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I, JAMES D. WHITTEMORE, Counsel for Respondent and a member of the bar of this Court, hereby certify that on the 27th day of February, I served a true and correct copy of Respondent's Response to Petitioner's Petition for Writ of Certiorari on Davis G. Anderson, Assistant Attorney General, State of Florida, 1313 Tampa Street, Suite 804, Park Trammell Building, Tampa, Florida 33602, by depositing same in the United States Post Office or mailbox, with first class postage, pre-paid. All parties required to be served have been served.

JAMES D. WHITTEMORE, ESQUIRE